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Portland, Oregon
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Some Instances of Unsatisfactory Results under Initiative Amendments of the Oregon Constitution*

To the man untrained in law, not alone statutory law, but the common law and the laws of sociology, it doubtless seemed very simple, sufficient and efficient to adopt and to exercise the powers under the initiative and referendum amendments of the Oregon Constitution relating to enacting laws and amending the Constitution by the legal voters of the State at large, but also by enacting and amending charters of cities, towns and other municipal corporations by their legal voters, and thus largely to do away with precedents and hasten the dawn of a political and social millennium in the body politic.

That men selected by popular vote to make up the State Legislature were often careless, somtimes stupid and occasionally venal, seemed to prove that men assembled in a legislative body were a curse instead of a blessing, and that the same men, together with the voters who had chosen them, were careful, intelligent, efficient, virtuous, capable and honest men when acting individually as law makers. Apparently these alleged reformers thought that as precedent was sometimes a bar to progress it should be done away with as far as possible. But they forgot—or more likely, as they could not forget what they never knew—they were unaware that to upset existing conditions is to create new conditions without precedents, and that the first thing to do is to establish new precedents that the new order may exist and continue. That, as was said by Herbert Spencer of similar conditions, that it was like an unskillful worker in metals who had a pot with a metal top which fitted in all places but one, and in endeavoring to make it fit in this one place struck it with a hammer, and the result

* See Appendix D, page 39, for a discussion of the amendment of the Oregon Constitution, adopted November 8, 1910, making nugatory trial by jury, by a method of appeal to the Supreme Court.

was that while it fitted tolerably well in this one place, there were many places where it fitted before where it did not fit at all.

These theorists seem to believe that all human ills—with the possible exception of physical ones—could be done away with by amendments of Constitutions and municipal charters, and by the passage of statutes and ordinances. And thus the laws of sociology could be repealed or amended, possibly even the law of supply and demand and also the law of gravity, and thus upset gravity.

And so it came about that without changing the voters, except by numbers, as Oregon is a growing State, the people who supposed they could not govern themselves by a representative form of government, to which they were accustomed, adopted a democratic form of government, of which they knew nothing as to its workings, evidently believing that as they were incapable of electing proper representatives they were capable of enacting their laws by popular vote, and as conditions were unsatisfactory they could be bettered by upsetting the existing order.

But the result, partly at least, must be disappointing to these theorists, for the crudity of these popular amendments of the Constitution and other enactments has been such that they have been amended by the Courts—practically legislating amendments by decisions—to make these enactments workable. Fortunately, perhaps, these initiative amendments of the Constitution do not provide against their amendment by judicial decisions. And this suggests whether a further amendment to the initiative provisions of the Oregon Constitution might not be made by abolishing the Legislature and giving all legislative power to the people and to the Courts, as seems to be the case with these amendments of the Constitution.

In this address I shall call attention mainly to the enactment and amendments of charters of cities, towns, and other municipal corporations under the Oregon Constitution as amended, so as to allow the legal voters of each city and town to enact and amend its own charter, and to decisions of our

Courts in relation thereto. To consider the whole initiative and referendum scheme of government in Oregon would require a book with copious notes.

The Initiative and Referendum Constitutional Amendments of the Oregon Constitution

By initiative vote, June 2, 1902, Section 1 of Article IV of the Constitution of Oregon was amended by which legislative "measures" or amendments to the Constitution could be adopted under an initiative petition. It will be noted that the number of voters necessary to sign an initiative petition is not prescribed, but is left uncertain, and expressed in the negative, by the words, "not more than eight per cent of the legal voters shall be required to propose any measure by such petition," while the number of legal voters to sign a referendum petition is fixed, viz.: "Five per cent of the legal voters." * Nor did the act of February 24, 1903, provide the number or percentage of voters necessary to sign an initiative petition.

I shall presently show that the Legislative Act of February 25, 1907, which repealed said act of 1903, does not provide the number or percentage of voters necessary to sign an initiative petition, although it does provide the percentage of voters necessary to sign a referendum petition against any municipal measure.

It is further provided by said amendment of the original Section 1 of Article IV of the Constitution, that "The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted." This last clause applies only to said Section 1, and does not apply to Section 1a of said Article IV, adopted in 1907, relating to initiative and referendum petitions concerning municipal legislation.

Under initiative petition the people of the State of Oregon on June 4, 1906, amended said Article IV of the State Con-

* See Appendix A.

stitution by adding to it a section called Section 1a, and at the same time amended Section 2 of Article XI of the Constitution.

The part of said Section 1a relating to municipalities and districts is as follows:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town." *

Said Section 2 of Article XI as so amended is as follows:

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon." †

The Oregon Supreme Court has held that Section 1a of Article IV and Section 2 of Article XI of the Oregon Constitution as amended must be construed together, so that this question may be considered as settled.

Farrell v. City of Portland, 52 Ogn. 587.

These two amendments of the Oregon Constitution (Sec. 1a of Article IV and Section 2 of Article XI) I shall refer to as "the amendments of 1906."

The Oregon Supreme Court has held in several cases that the provisions of the amendments of 1906 are not self-executing, but require a general law passed by the Legislature or proper action by a municipality or its voters to make these amendments effective. These decisions I shall more specifically refer to.

* See Appendix B.

† See Appendix C.

The Law in Oregon Prior to the Initiative and Referendum Amendments to its Constitution

It is proper first to consider some phases of the law as they were established and had become *stare decisis* prior to these amendments. I call particular attention to the law as so established on the following powers and subjects, viz.:

First. The law of Eminent Domain.

Second. The power to grant franchises and the control of highways.

Third. The law relating to bridges on navigable rivers wholly within a State.

First, The Law of Eminent Domain

In *10 Am. and Eng. Ency. of Law* (2d Ed.), page 1049, it is said:

"The right to exercise the power of eminent domain is inherent in sovereignty, necessary to it and inseparable from it. From the very nature of society and organized government this right must belong to the State. It is a part of the sovereign power of every nation. * * * It lies dormant in the State until legislative action is had pointing out the occasions, the modes and the agencies for its exercise."

In *Lewis on Eminent Domain,* Sections 237 and 238, it is said:

"Sec. 237. The power of eminent domain, being an incident of sovereignty, is inherent in the Federal Government and in the several States, by virtue of their sovereignty. It does not exist in any subordinate political division or public corporation unless granted by the sovereign power. Consequently it does not exist in any territorial government unless it has been expressly granted by Congress. This power, with all its incidents, is vested in the Legislatures of the several States by the general grant of legislative powers contained in the Constitution. From this it follows, first, that the power can only be exercised by virtue of a legislative enactment; second, that the time, manner and occasion of its exercise are wholly in the control and discretion of the Legislature, except as restrained by the Constitution."

"Sec. 238. **The necessity for exercising the power is exclusively for the Legislature.** Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the Legislature."

In *Mills on Eminent Domain,* Section 1, it is said:

"Eminent domain, or the power of the sovereign to condemn private property for public use, has been recognized and treated of by

jurists for centuries. The commentators on the civil law treat it as an established power of long standing. Puffendorf calls it the 'exercise of transcendental propriety'; as if the sovereign thereby resumed possession of that which had been previously granted to the subject upon the condition that it might be again resumed to meet the necessities of the sovereign. * * * In the United States this right of the subject is secured by the Federal Constitution, and by a separate clause in the Bill of Rights of almost every State in the Union. In the absence of provisions in the Constitutions, the Courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void. The Constitutions of the States do not confer upon the Legislatures the power of eminent domain, but they recognize its existence and attach conditions upon the exercise of the power. The right existed prior to the Constitutions."

In *2 Elliott on Railroads* (2nd Ed.), Section 950 (page 473), it is said:

"The power of eminent domain has existed in all ages as an acknowledged attribute of sovereignty. It is inherent in every sovereign Government, and is not conferred by Constitutions, but is limited and regulated by them. It cannot be surrendered by grant or contract, since its continued exercise is essential to the existence of organized society. This power exists in each of the States of the Union, whether it is expressly conferred by the Constitution or not."

In the case of *Leeds v. The City of Richmond,* 102 Ind. 377, speaking of the right of a municipal corporation to exercise the powers of Eminent Domain, the Supreme Court of Indiana said:

"The high and extraordinary power of eminent domain may not exist without a special grant of power," Citing 2 Dillon Mun. Cor. (3rd Ed.), Sections 574, 575.

In *Cooley on Constitutional Limitations* (7th Ed.), page 753, Eminent Domain is defined as:

"That superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for the public benefit without regards to the wishes of its owners."

The power of Eminent Domain is not inherent in a municipal corporation, nor is it granted, nor can it be exercised merely by implication. It must be granted by the Legislature, unless the Legislature is prohibited from so doing by the Constitution, or be granted by the Constitution of the State, by express terms, or by a necessary implication equivalent to express

terms. Eminent Domain being an incident of sovereignty its exercise can be granted by the State to municipal corporations and *quasi* public corporations. Of course, the people of a State can determine the exercise of this power by means of appropriate provisions in its Constitution. There are no express provisions in the Oregon Constitution giving this power. It therefore rests wholly in the Legislature unless Section 2 of Article XI, as now existing, grants the right to exercise such power. The only power given is as follows:

"The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

It must be borne in mind that the power to enact and amend charters is subject to the Constitution of the State, and to the sovereignty of the State; and that the exercise of the power of Eminent Domain is a matter which concerns all the people and the State itself. That this power may be delegated to a city or town through proper authority needs no citation of authorities. Can it be truly said that the mere right to enact or amend a charter is a grant or a delegation of the sovereign power of Eminent Domain without limitation? And, if limited, are its limitations other than Section 18 of Article I of the Oregon Constitution, which is:

"Private property shall not be taken for public use, nor the particular service of any man be demanded, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

Prior to the adoption of the amendment of 1906 the Oregon Supreme Court had passed on questions involved in the power of Eminent Domain in a number of cases, among which are the following:

In *Dallas Lumbering Co. v. Urquhart,* 16 Ogn. 67, Mr. Justice Strahan said (pages 69, 70):

"It is not for the Courts to say in what particular instances or for what purposes the power of eminent domain may be exercised; that power belongs exclusively to the Legislature, limited only by the Constitution, and that is, the use must be public and just compensation must be made.

"Says an eminent American author: 'As the power to take is universal, so it is absolute; that is to say, the Legislature are the sole

judges of the existence of the exigency which demands the sacrifice of the rights of individuals.' 'I admit,' says Mr. Chancellor Walworth, 'that the Legislature are the sole judges as to the expediency of exercising the right of eminent domain for the purpose of making public improvements, either for the benefit of the inhabitants of the State generally, or of any particular section thereof.'"

In *Bridal Veil Lumbering Co. v. Johnson,* 30 Ogn. 205, Mr. Justice Bean said (page 208):

"The right of eminent domain is a right of sovereignty, and can be exercised only by legislative authority."

In *Grady v. Dundon,* 30 Ogn. 337, Mr. Chief Justice Moore said:

"The power to appropriate private property to public use is derived from the Legislative Assembly, which may prescribe the mode of its exercise, and must provide a judicial tribunal for the determination of certain facts as a prerequisite to the exercise of such power (2 Kent's Commentaries, 340)."

In *Huddleston v. Eugene,* 34 Ogn. 343, Mr. Justice Moore, speaking of the exercise of the right of Eminent Domain, said (page 358):

"No prerogative of sovereign power should be watched with greater vigilance than that which takes the property of the individual, and devotes it to a public use."

In *Grand Ronde Electric Co. v. Drake,* 46 Ogn. 246, Mr. Chief Justice Moore said (page 248):

"It has been held by this Court that the Legislative Assembly must in the first instance declare the necessity for and the expediency of an exercise of the right of eminent domain in an act conferring power for that purpose."

It will thus be seen that the Oregon Supreme Court had established the doctrine that under the Constitution of the State the right of Eminent Domain "can be exercised only by legislative authority," and thus made this doctrine a part of the Oregon Constitution. Certainly it is as much a part of the Oregon Constitution as the leading cases decided by the Supreme Court of the United States construing parts of the Constitution of the United States have become a part of the latter Constitution. The opinions of Chief Justice Marshall and other great judges of the Supreme Court of the United States are now recognized by all Courts and by the legal pro-

fession as being as much a part of the Constitution of the United States as though the principles therein announced had been expressly set forth in that Constitution itself.

Under said Section 2 of Article XI, as amended, of the Oregon Constitution, does not the limitation that amendments of municipal charters shall be "subject to the Constitution" make such amendments subject to these decisions of the Supreme Court of Oregon, which are a part of its Constitution? This applies not only to the powers of Eminent Domain, but also to the regulation and control of highways and the granting of franchises thereon.

It would seem that at the time of the adoption of the amendment of Section 2 of Article XI of the Constitution, in June, 1906, the power of the legal voters of a municipal corporation "to enact or amend their municipal charter, subject to the Constitution" did not give the power to such voters to give a municipality the right to exercise the powers of Eminent Domain by its own initiative, but that such powers could be conferred only by an amendment to the Oregon Constitution or by the Legislature, especially as the Oregon Supreme Court, in *Straw v. Harris,* 54 Ogn. 424, held that the Legislature, by a general law, "may at any time alter, amend or even repeal any or all of the charters within it," and could thus give to municipalities the right to exercise the power of Eminent Domain.

It must not be forgotten that a city has imposed upon it two kinds of duties or powers: one public, or governmental, as an instrumentality of the State, and under which it exercises police powers; the other is private, or proprietary, in which it is as a legal individual. It is in the latter capacity that it owns its water works and other public utilities, and as such it is liable for negligence as a private corporation or an individual is. I call attention to the learned and complete decision on this question by Mr. Justice Bean in *Esberg Cigar Co. v. Portland,* 34 Ogn. 282.

See also *Wagner v. Portland,* 40 Ogn. 394.

In the exercise of the power of Eminent Domain (which is not a part of the police power), a city had to be granted by the Legislature the right to exercise the power of Eminent

Domain, and, particularly so, when it sought to appropriate property for use under its duties as a proprietor, *e. g.* as the owner of public utilities.

Second, The Power to Exercise Control over Streets, and Highways and to Grant Franchises

The streets of a city do not belong to a city, but to the people of the whole State, as highways, and no control can be exercised over them, and no franchise can be granted over them unless authorized by the Legislature or by the Constitution. This was the law, at least, when the amendments of 1906 were adopted.

The law on this subject is well stated in *3 Elliott on Railroads* (2nd Ed.), Section 1076, where it is said:

"The Legislature of the State represents the public at large and has paramount authority over its public ways, including the streets in cities as well as country roads. Municipal corporations have no inherent power to create other corporations or grant franchises, and they cannot give a railroad company the right to lay its tracks and operate its road in their streets unless they are authorized, either expressly or impliedly, to do so by the Legislature. Authority to use highways in this way must come, either directly or indirectly, from the Legislature."

In *3 Abbott on Municipal Corporations,* Section 897, it is said:

"The State is the ultimate and original source of power in respect to the establishment, maintenance and use of highways. Any lawful permission, whatever it may be called, must proceed from the State Legislature and the validity of grants is determined by the Constitution and other tests applied to all legislation. Special acts cannot be passed where the Constitution forbids. The Legislature can act in the granting of permission independent of subordinate governmental agencies of the State, though the tendency of later years, which is well grounded in reason, is for the State to confer upon local municipal authorities the right to represent and to act for it in the granting of permission for the occupation or use of the public highways. The power, however, when exercised by municipal or other subordinate public corporations, must be expressly granted or appear by indisputable implication."

That this was the law in Oregon is well established by a number of decisions of the Oregon Supreme Court, among which are the following:

In *City of East Portland v. Multnomah Co.,* 6 Ogn. 62, Mr. Justice McArthur said (page 65):

"The paramount and primary control of the highways of a State, including the streets in cities, is vested in the Legislature."

In *Multnomah County v. Sliker,* 10 Ogn. 65, Mr. Chief Justice Lord said:

"The facts in this case are stipulated, and involve the identical question decided by this Court in the case of **East Portland v. Multnomah County** (6 Or. R. 64), and subsequently, the principle on which the decision in that case proceeded, was re-examined and reaffirmed in the case of the **City of Astoria v. Clatsop County,** not reported for the reason that the question presented in the two cases were identical. It will thus be seen that the subject matter of this action has already received a careful and thorough investigation from the Court, and ample opportunity has been afforded for the correction of any error into which the Court might have fallen in the original decision. It is now brought the third time before us on briefs which cite no authorities, and suggest no reasons which have not already been considered by the Court, or which show that the original case was decided contrary to principle. The matter here is the Constitutionality of a statute, and the rule is said to be almost universal that in construing statutes and the Constitution, to adhere to the doctrine of **stare decisis.** (**Seale v. Michell,** 5 Cal. 481.) Certainly Courts naturally feel reluctant to depart from a decision which has been recognized by subsequent cases, unless error is plainly shown to exist, conceding even that a different conclusion might be reached, if the question presented were an open one. We have carefully examined the reasons on which the decision in **East Portland v. Multnomah County** is based and, as at present advised, reaffirm it by affirming the decision in this case. So it is ordered."

Do the amendments of 1906 abolish this application of *stare decisis?* If so, may not the Oregon Constitution be amended by the initiative so that *stare decisis* will be abolished altogether? It appears to have been set aside by the Supreme Court as applied to the exercise of the powers of Eminent Domain by cities and towns.

In *Portland, etc., R. R. Co. v. City of Portland,* 14 Ogn. 194, Mr. Chief Justice Lord said:

"The interest in the use of streets and highways, and public places, and their uses, being **publici juris,** the power of regulating such use is in the Legislature, as the representative of the whole people. It is a part of the political or governmental power of the State, in no way held in subordination to the municipal corporation. It has, therefore, been held in many cases that the Legislature has the power to authorize the building of a railroad on a street or high-

way, and may directly exercise this power, or devolve it upon municipal authorities. (**Moses v. Railway Co.**, 21 Ill. 516; **Murphy v. Chicago**, 29 Ill. 279; **Mercer v. Railway Co.**, 36 Pa. St. 99; **Springfield v. Railroad Co.**, 4 Cush. 63; **People v. Kerr**, 27 N. Y. 188; **Lackland v. Railroad Co.**, 31 Mo. 180; **City of Clinton v. Railroad Co., supra.**)"

In *Simon v. Northrup,* 27 Ogn. 427, Mr. Chief Justice Bean said (pages 501, 502):

"The law is too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the Legislature is the representative of the public at large, it has, in the absence of any Constitutional restriction, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency, so long as they are not diverted to some use substantially different from that for which they were originally intended: **2 Dillon on Municipal Corporations**, 656, and authorities there cited; **Cooley on Constitutional Limitations** (5th Ed.), 335, and note."

On page 502 he said:

"A city occupies, as it were, a dual relation to the State—the one governmental or political, and the other proprietary or private. In its governmental or political capacity it is nothing more than a mere governmental agent, subject to the absolute control of the Legislature, except as restricted by the Constitution, and such property and easements as it may have in public streets and ways is held by it in such capacity, and at the will of the Legislature."

And on page 504 he said:

"It is competent for the Legislature, in the exercise of its plenary powers over public highways of the City of Portland, to transfer the management and control of the bridges and ferries in question from the Commission appointed by it to the county, and to determine and provide the mode in which the burden of maintaining and keeping them in repair shall be borne in the future."

Third, Rights in Navigable Rivers Wholly Within a State

By a number of decisions the United States Supreme Court has established the law relating to navigable rivers wholly within a State. The earlier decisions were made before Congress passed any law on the subject.

In the case of *Willamette Iron Bridge Co. v. Hatch,* 125 U. S. 1, it was held that the provision in the "act for the admission of Oregon into the Union," 11 Stat. 383, c. 33, Sec.

2, that "all the navigable waters of said State shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost or toll therefor," does not refer to physical obstructions of those waters, but to political regulations which would hamper the freedom of commerce.

On page 10, Mr. Justice Bradley, referring to the above quotation from the act for the admission of Oregon into the Union, said:

"It is obvious that if the clause in question does prohibit physical obstructions and impediments in navigable waters, the State Legislature itself, in a State where the clause is in force, would not have the power to cause or authorize such obstructions to be made without the consent of Congress. But it is well settled that the Legislatures of such States do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original States, in reference to which no clause exists."

And on page 12 he said:

"Until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose."

This was prior to the Act of Congress of March 3, 1899, relating to the construction of bridges, etc., in navigable streams. This act has been amended by several acts of Congress.

In the case of *Lake Shore & Michigan Ry. Co. v. Ohio,* 165 U. S. 365, the Act of Congress of September 19, 1890, was involved. Section 7 of this act provides that it shall be unlawful to commence the construction of any bridge, etc., in any navigable river, etc., "under any act of the *Legislative Assembly of any State* until the location and plan of such bridge or other work have been submitted to or approved by the Secretary of War." It was held that said act did not deprive a State of authority to bridge such a river, but created an additional remedy to prevent such a bridge from interfering with commerce. I have not found any act of Congress

which allows the assent of the State to be exercised except under an act of its Legislative Assembly.

In *Cummings v. Chicago,* 188 U. S. 411, it was held that under existing legislation the right to erect a structure in a navigable river, wholly within the limits of a State, depends upon the concurrent or joint assent of the State and National Governments acting by their constituted agencies.

In *Montgomery v. Portland,* 190 U. S. 89, the case of *Cummings v. Chicago, supra,* was expressly affirmed. On page 106, Mr. Justice Harlan said:

> "Upon the authority, then, of **Cummings v. City of Chicago** and the cases therein cited—to which we may add **Willamette Bridge Co. v. Hatch,** 125 U. S. 1—we hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State, cannot be said to be complete and absolute without the concurrent or joint assent of both the General and State Governments."

It therefore appears that so far as a State is concerned it must in its sovereign capacity as a State and by its Legislature give its assent or authority for the construction of a bridge over a navigable river wholly within its boundaries.

I have thus set forth what I believe to be the law in Oregon on the three subjects, viz.: Eminent Domain, power to grant franchises and control of highways, and relating to bridges across navigable rivers wholly within a State at the time the amendments of 1906 were adopted.

It is now contended that the amendments of 1906 have rendered nugatory and made void and of no effect the law on these three subjects, as they existed at that time. This contention is based on the facts that, by these amendments, the people of a municipality are granted the power "to enact and amend their charter," although no definition is made of what a charter is, and that these amendments give to each city and town in Oregon the right to exercise these sovereign powers equal or superior to the State itself, at least within their respective corporate limits.

It has, heretofore, been thought that the exercise of these sovereign powers should be granted only after careful consid-

ration by the Legislature, as the representative of the whole State and of all of its people, and that no community had, or should have, the right to exercise, without limitations, these powers, which might be used to the detriment of all the rest of the State.

Decisions of the Oregon Supreme Court on the Initiative and Referendum Powers to be Exercised by a Municipality

The validity of the amendment of Section 1 of Article IV of the Oregon Constitution was sustained in *Kadderly v. Port of Portland,* 44 Ogn. 118.

In the case of *Stevens v. Benson,* 50 Ogn. 269, decided September 3, 1907, it was held that said amended Section 1 of Article IV of the Constitution is self-executing. On page 274 it is said:

"The Legislature may enact laws to facilitate the enforcement of Constitutional provisions that are self-executing, and such laws will be obligatory upon the Court when intended by the Legislature to be mandatory, so long as they do not curtail the rights reserved or exceed the limitations specified therein."

In the case of *State v. Langworthy,* 104 Pac. 424 (not yet reported in the State Reports), decided October 26, 1909, it is said:

"It is manifest from the provisions of this amendment" (Section 1 of Article IV) "that it was intended to be self-executing; that is, its provisions were designed to become effective without awaiting legislative aid. Under such circumstances supplemental laws are not a prerequisite to the effectiveness of a Constitutional provision, and the people may proceed in accordance therewith until aided by such additional enactments as the law-making department of the State may provide."

As neither of these two decisions refer to the number or percentage of voters necessary to sign an initiative petition, and as the Supreme Court declared said Section 1 self-executing, and as there is no law on the subject, we are left in doubt as to the number or percentage of voters necessary to sign an initiative petition under that section. Whether the words, "Not *more* than eight per cent of the legal voters" should be construed to mean "not *less* than eight per cent of

the legal voters," or whether they mean any number less than eight per cent, or any number not exceeding eight per cent, has not been decided. Literally, "not more than eight per cent" may mean one voter or two, or half a dozen.

In the cases of *McKenna v. The City of Portland,* 52 Ogn. 191, and *Farrell v. The Port of Portland,* 52 Ogn. 582, it was held that the amendments of 1906 must be construed together.

It will be noted that said Section 1a of Article IV provides that:

"The manner of exercising said powers" (initiative and referendum), "shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation."

It has been held by the Supreme Court of Oregon that the provisions of said Section 1a, so far as municipal corporations are concerned, are not self-executing, in the following cases:

In the case of the *Acme Dairy Company v. City of Astoria,* 49 Ogn. 520, the Common Council of Astoria, prior to the passage of the law of 1907, amended the charter of the city, without action by the legal voters of Astoria, so as to provide the manner of exercising the initiative and referendum powers by the people. The Supreme Court held that the Common Council had such power. In deciding this case Mr. Justice Moore, referring to said Section 1a of Article IV, said:

"The right reserved by the Constitutional amendment is not self-executing, and cannot be carried into effect in the absence of a general statute prescribing the mode of its exercise."

In the case of *McKenna v. City of Portland,* 52 Ogn. 191, Mr. Chief Justice Bean, referring to the amendments of 1906, on page 194, said:

"As no provision is made therein for the manner of exercising the power thus conferred, some law upon the subject was necessary to make it effective, and the law of 1907 was adopted for that purpose."

It was further held, in that case, that at that time, there being no legislation of the City of Portland conflicting with the provisions of said law of 1907, the Council of Portland having initiated and submitted an amendment to the charter

of Portland on its own motion, which was adopted by its people, that such charter amendment was properly submitted.

In the case of *Long v. City of Portland,* 53 Ogn. 92, Mr. Justice Eakin, on page 96, said:

"Section 1a of Article IV of the Constitution is not self-executing, for the reason that it makes no provision as to its enforcement. It only declares or resrves the right, without laying down rules, by means of which this right may be given the force of law. (Citing cases.) It contains no provisions as to the time and place of filing the petition, nor the time when, or manner in which, the law voted upon shall take effect."

In the case of *State ex. rel. Bradford v. Portland Railway Light and Power Company,* 107 Pac. 958 (not yet reported in the Oregon Reports), Mr. Justice Slater said:

"The amendment to the Constitution, above quoted, reserves to the people of every municipality, city or town the general right of referendum, as to municpial legislation, without laying down rules by means of which such right may become effective, or be in force; and, therefore, it is not self-operative. (**Long v. Portland,** 98 Pac. 149, 150.) But the amendment does declare that the manner of exercising the power granted shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the same, as to their municipal legislation."

In the case of *Kiernan v. City of Portland,* 111 Pac. Rep. 379, which I shall refer to as "the Kiernan case," decided by the Oregon Supreme Court November 2, 1910, Mr. Justice McBride, in his opinion, quotes with approval the decision of the Supreme Court in *Acme Dairy Company v. City of Astoria, supra,* that said initiative amendment relating to cities is not self-executing. So it may be said to be well established that the initiative powers under the amendments of 1906 are not self-executing, and require some law, either by the Legislature or by the municipality itself, to put the same into force or effect.

It is strange, but true, that neither in the act of 1903, relating to initiative petitions under Section 1 of Article IV of the Constitution, nor in the act of 1907, relating to initiative petitions under said Section 1 and under said Section 1a of Article IV, was any provision made for the number of signatures to an initiative petition. Section 13 of the Act of 1907 provides:

"Any person who is a qualified elector of the State of Oregon may sign a petition for the referendum or for the initiative for any measure which he is legally entitled to vote upon."

Section 11 of the Act of 1907 provides:

"Referendum petitions against any ordinance, franchise or resolution passed by the City Council shall be signed by not less than ten per cent of the voters of said city, and said signatures shall be verified in the manner herein provided."

But there is nothing in the act saying in what manner the signatures shall be verified, nor how the number of legal voters shall be determined. It is true that in said Section 1 of Article IV a provision is made for ascertaining the number of voters by providing that:

"The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted."

But this applies only to initiative and referendum petitions for amendments of the Constitution or on legislation by the people of the whole State.

In said Section 1a of Article IV it is provided:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation."

So it will be seen that while the initiative and referendum powers are granted to the people of a municipality, the manner of the exercise of these powers is not provided in Section 1 of Article IV, and is of no force in regard to initiative and referendum petitions under Section 1a until there be appropriate legislation on the subject.

Until appropriate legislation is had providing how many voters shall sign an initiative petition under Section 1 of Article IV, and also as regards the number of signatures to an initiative petition under Section 1a, or until the

Supreme Court shall make some decision on this question, this question is unsettled. The Supreme Court, of course, may decide that no more than eight per cent, and not more than fifteen per cent means not less than eight per cent, and not less than fifteen per cent, respectively, or it may hold that any number less than such percentage would be sufficient under an initiative petition. But as the Supreme Court has held, in the cases I have cited, that Section 1a of Article IV is not self-executing, it would seem that the logical result would be that no initiative petition could be filed until there be some law of the State or some ordinance adopted by a city, or by amendment of its charter, providing the percentage of voters necessary to sign an initiative petition under said Section 1a, and that the provision, in said Section 1a, that not more than fifteen per cent of the legal voters may be required to propose any measure, by the initiative, in any city or town, is not a determination of the number of the legal voters necessary to sign such an initiative petition, but is a limitation on the number or percentage of voters which shall be required by any general law of the State or by an ordinance of a city or town on the subject, *i. e.,* that such a law or ordinance shall not require "more than fifteen per cent" (of the legal voters) "to propose any measure, by the initiative, in any city or town."

In this connection, attention is called to the decision in the case of *Long v. City of Portland, supra,* in which Mr. Justice Eakin, on page 96, said:

"Section 1a of Article IV of the Constitution is not self-executing, for the reason that it makes no provision as to its enforcement. It only declares or reserves the right, without laying down rules, by which this right may be given the force of law. (Citing cases.) It contains no provisions as to the time and place of filing the petition, nor the time when, or the manner in which, the law voted upon shall take effect."

What is known as the McNary Ordinance, adopted by the Council of Portland, has made provision for the filing of initiative and referendum petitions in the City of Portland. Section 9 of this ordinance provides that an initiative petition, as well as a referendum petition

"Shall be signed by a number of legal voters equal to fifteen per cent of the votes cast at the last preceding election."

It should be borne in mind that said Section 1a provides that "not more than ten per cent of the legal voters may be required to order a referendum." So there is a conflict between the McNary ordinance and the Constitution, although the provisions of Section 11 of the Act of 1907 may apply, which provides that "referendum petitions against any ordinance, franchise or resolution passed by a City Council shall be signed by not less than ten per cent of the voters of said city." The Supreme Court might hold that Portland, having adopted the McNary ordinance, the void provision would not be enforced under the Act of 1907.

Section 5 of said McNary ordinance provides that the Auditor of Portland "shall verify the signatures and voting qualifications of the persons signing the same" (referendum and initiative petitions), "by reference to the registration books in the office of the County Clerk of Multnomah County."

This is a recognition that the whole number of votes cast for Justice of the Supreme Court at the general election last preceding the filing of any petition, does not apply to said Section 1a of Article IV.

The Supreme Court of Oregon has also passed on the question as to the rights of the Legislature and of the people of a municipal corporation to alter, amend or repeal its charter or act of incorporation. Without such decisions, it would appear that it was the intention of the people adopting the amendment of Section 2 of Article XI of the Constitution, that the Legislature could not in any way enact, amend or repeal the charter of any municipality in the State of Oregon. Earlier cases so decided.

In *Acme Dairy Company v. City of Astoria, supra,* Mr. Justice Moore, referring to Section 2 of Article XI, as amended, said:

> "It will thus be seen that this change in the organic law deprives the Legislative Assembly of all authority to enact, amend or repeal any charter of a city or town, the legal voters of which reserve to themselves the exercise of all such powers, except the right of repeal."

In *City of Eugene v. Willamette Valley Co.,* 52 Ogn. 490, Mr. Justice Moore, referring to said Section 2 of Article XI, as amended, said:

"It will thus be seen that the Legislative Assembly has been deprived of the power specified, which is reserved to, and may be exercised by the legal voters of a city or town. As the Legislature could, heretofore, have changed a municipal charter or altered any part of it, except that vested rights could not be impaired or destroyed, it would seem necessarily to follow that, under the amended clause of the Organic Act quoted, the qualified voters of every town and city possessed the same measure of power."

In *Farrell v. The Port of Portland, supra,* Mr. Justice Bean, referring to the amendments of 1906, said:

"The manifest purpose, so far as it concerns the question now under consideration, was to take from the Legislature and vest in the people the power to amend municipal charters and acts governing and defining the powers and duties of all municipal corporations."

In *Long v. City of Portland, supra,* it was held that Section 11 of the Act of 1907, which provides that no city ordinance shall take effect and become operative until thirty days after its passage by the Council and approval by the Mayor, unless the same shall be passed over his veto, and in that case it shall not take effect and become operative until thirty days after such final passage, in effect, amends the charter of the City of Portland, for the reason that the right of the referendum is reserved to the people of the city regardless of any provisions of its charter, and that this right is superior to the charter, and that the amendments of 1906 and said Section 11 of the Act of 1907, to give the referendum force, did amend the charter of the City of Portland.

As I have set forth in the beginning, that, having no established precedents in these innovations by the initiative and referendum powers in the Constitution, it is difficult to make them workable. It is somewhat like navigating a ship in the open sea without chart, compass or chronometer. It is true that under such circumstances a skillful mariner, with proper instruments, by observations of the sun, moon and stars, might navigate, but it would be difficult, and the liability to make errors would be great. It is a hard matter for any Court, without precedent, to take into account what may be the effect of a decision or opinion in one case on other cases or matters not before decided by any Court. And this is largely the position the Oregon Courts find themselves in. When the Supreme Court found what the effect would be in

holding that the Legislature could not enact, amend or repeal any municipal charter in the State, and that a municipality might attempt to exercise powers in derogation of the sovereignty of the State itself, it became a serious matter. As a result we have, the somewhat remarkable decision, in the case of *Straw v. Harris,* 54 Ogn. 424, decided August 24, 1909.

The facts in this case are as follows:

The Legislature enacted a law at its session in 1909 entitled:

"An act to provide for incorporation under general law of ports in counties bordering upon bays or rivers navigable from the sea or containing bays or rivers navigable from the sea, and to provide for the manner of incorporating such ports and defining the powers of ports so incorporated, and declaring an emergency."

Under the provisions of this act the Port of Coos Bay was incorporated, which included within its boundaries the incorporated towns of North Bend, Marshfield, East Marshfield and Empire City, in one of which a majority voted against the organization of the Port. The principal question in this case was the constitutionality of said Legislative Act, under which the Port was incorporated, as it was contended that the effect thereof was not only to amend, but to repeal parts of the charters of the municipalities thus included, in violation of Section 2 of Article XI, as amended, of the Constitution of Oregon.

Two main points were decided in *Straw v. Harris:*

First. That under the initiative and referendum amendments of the Constitution there are two separate and distinct law-making bodies, each equal, viz.: The Legislature and the people.

Second. That the State has not surrendered its sovereignty to the municipalities to the extent that the State has lost control of the municipalities.

In the opinion, Mr. Justice King, on page 431, said:

"By the adoption of the initiative and referendum into our Constitution, the legislative department of the State is divided into two separate and distinct law-making bodies. There remains, however, as formerly, but one legislative department of the State. It operates,

it is true, differently than before—one method by the enactment of laws directly, through that source of all legislative power, the people; and the other, as formerly, by their representatives—but the change this wrought neither gives to nor takes from the Legislative Assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. Nor do we understand that it was ever intended that it should do so. The powers thus reserved to the people merely took from the Legislature the exclusive right to enact laws, at the same time, leaving it a co-ordinate legislative body with them. This dual system of making and unmaking laws has become the settled policy of the State, and so recognized by decisions upon the subject. **Kadderly v. Portland,** 44 Ogn. 118 (74 Pac. 710; 75 Pac. 222); **Oregon v. Pac. Sta. T. & T. Co.,** 53 Ogn. 162 (99 Pac. 427).

"Subject to the exceptions enumerated in the Constitution, as amended, either branch of the legislative department, whether the people, or their representatives, may enact any law, and may even repeal any act passed by the other. One of these exceptions relates to the invoking of the referendum and the other to the provision in the amendment quoted, which takes from the Legislature the right to create corporations by special laws; otherwise there is no distinction."

And on page 437, Mr. Justice King further said:

"The State, therefore, regardless of any declarations in its Constitution to the contrary, may at any time revise, amend, or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental laws. This, under the Constitution as it now stands, may be done by the Legislature through general laws only, and the same authority may be invoked by the people through the initiative by either general or special enactments; only the Legislature being inhibited from adopting the latter method."

These statements of the law hardly agree with the statement later in the opinion that the State has not surrendered to the municipalities its control over them.

Instead of two law-making bodies there would seem to be three, or, possibly, four:

First. The Legislature,

Second. The people of the whole State,

Third. The people of a municipality,

Fourth. The Common Council or Commissioners of a municipality.

The holding that the people and Legislature may each "enact any law and may even repeal any act passed by the

other," shows to what a dangerous condition these initiative amendments of the Constitution have brought the State of Oregon. It is a condition similar to that which would occur if the sole legislative body of a State was composed of two houses which did not have to concur to enact a law, and each could enact laws to the exclusion of the other, "and even repeal any act passed by the other."

Suppose that in the State of Oregon two antagonistic acts were passed, one by the Legislature, the other by the people, and these two acts when into effect the same day. What would be the result? It would be like the celebrated case of an irresistible force meeting an immovable body. Will not the Legislature become as useless as a *vermiform appendix* is to a human being? It may have some functions, but it is apparently a menace. Would it not be well to cut it out before it becomes dangerous?

In the case of *Straw v. Harris, supra,* on page 436, Mr. Justice King also said:

"True, the language used in the amendments considered would appear to give to incorporated cities the exclusive control and management of their own affairs, even to the extent, if desired, of legislating within their borders without limit, to the exclusion of the State. But, as stated, these provisions must be construed in connection with others of our fundamental laws, which can but lead to the conclusion above announced; and whatever may be the literal import of the amendments it cannot be held that the State has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control over them. This no State can do. The logical sequence of a judicial interpretation to such effect would amount to a recognition of a State's independent right of dissolution. It would but lead to sovereigntial suicide. It would result in the creation of States within the State, and eventually in the surrender of all State sovereignty—all of which is expressly inhibited by Article IV, Section 3, of our National Constitution."

The part of Section 3 of Article IV of the Constitution of the United States referred to by Mr. Justice King is as follows, viz.:

"No new State shall be formed or erected within the jurisdiction of any other State."

It is to be regretted that the opinion merely stated a general principle without going into details or citing instances,

e. g., the exercise of the right of Eminent Domain; or the control of streets and other highways, or the granting of franchises under powers given to a municipality by initiative proceedings of its legal voters, which it did not have before; or whether a port could not, by initiative proceedings, give itself all the powers of a city, and by being larger than a city, and in the case of the Port of Coos Bay, including four towns, take to itself and exercise supremacy over any and all cities and towns within the boundaries of a port. It must be borne in mind that in the case of *Farrell v. Port of Portland, supra,* it was held that the voters of a port could amend its charter or the act of its incorporation, for it is a municipal corporation, and no limitation is placed on its powers or right to amend its charter and give itself additional powers. The amendment of its charter, in question in that case, gave the Port of Portland largely increased powers. As it includes all of the City of Portland, and more, may it not practically, by initiative amendments, make itself superior to the City of Portland and grant franchises, and exercise the right of Eminent Domain in the City of Portland superior to the latter. There is no limitation on the power of any city, town, port or other municipal corporation to give itself additional powers, excepting that in *Straw v. Harris* it was held a municipality could not exercise a sovereignty superior to the State of Oregon. And it was also held that the Legislature could take away this power. But the Port could give itself the power again at the next general election, or at a special election, which could be held by the Commissioners of the Port of Portland amending its charter in a manner similar to that used by the City of Astoria, as appears in the case of *Acme Dairy Company v. Astoria, supra,* and that used by the Port of Portland, as appears in the case of *Farrell v. Port of Portland, supra.*

Moreover, in *Straw v. Harris,* it was held that the rights of a port are superior to that of a city or town. On pages 435-436 in the decision of the Oregon Supreme Court, Mr. Justice King said:

"We find that the Constitution, by permitting, through general laws, the exercise by municipalities of greater and more extensive prerogatives for other and different purposes, including the formation of ports, has thereby delegated to such larger districts the right

to take such steps as may be essential to the carrying out of the general purpose and object of their creation. The exercise of this privilege does not necessitate the elimination of the city governments, nor of any substantial part of them, within any of the territory included; nor does it in any respect interfere with the general object or purpose for which the included corporations were established. It may have the effect, it is true, of taking from them the control of wharves and docks, as well as some other privileges, whenever and wherever the exercise thereof becomes inconsistent with the object for which the port is incorporated."

But what would take place if the Port of Portland should give itself rights and powers superior to those of the City of Portland? Or if the latter should attempt to amend its charter so as to make it equal to or superior to the Port of Portland? Apparently each has the right to give itself all sovereign powers as against the other. It is only when a municipality interferes with the sovereignty of the State that the State can interfere. Just what such an interference is does not yet appear. Apparently it is not by a municipality giving itself powers of Eminent Domain, or the power to grant franchises over the highways of the State, or to build bridges across a navigable river without the consent of the State.

There have been but two later decisions only on this question by the Supreme Court of Oregon.

One of these decisions is *City of McMinnville v. Howenstine,* 109 Pac. Rep. 81 (not yet reported in the Oregon Reports), decided June 7, 1910.

In this case the City of McMinnville, by initiative amendment of its charter, gave itself the right to appropriate, under Eminent Domain, lands outside of the city for water works. Two opinions were written in this case. One held that under the amendments of 1906 the legal voters of a city or town might give it the right to exercise the power of Eminent Domain within and without its limits. And so the City of McMinniville might give itself these sovereign powers without authority from the Legislature. And that the right to enact or amend the charter of a city or town gives it the right, by amendment of its charter, to give itself the sovereign right to appropriate under the powers of Eminent Domain, lands to be used by such city or town under its functions as

a proprietor. The other opinion dissented from the first opinion, but held that under a general law of the Oregon Legislature, passed in 1891, prior to the adoption of any initiative amendment to the Oregon Constitution, the City of McMinnville had the right to appropriate lands for water works outside of its corporate limits. The effect of each of the two decisions was that the land could be appropriated. As to the views of the majority of the Supreme Court on this question, we are left in doubt, for the majority of the Court announced that they "concur in the conclusion reached in each of the foregoing opinions," the conclusions being the same.

The other case is that of *Kiernan v. City of Portland et al.*, decided November 2, 1910, 111 Pac. Rep. 379. The facts in this case are that, by amendment of its charter under the amendments of 1906, the City of Portland gave itself the power and right to construct a bridge over the Willamette River, a navigable river wholly within the State of Oregon, without being specifically authorized thereto by the Legislature. There were two opinions rendered, the majority of the Court evidently concurring in the result, without announcement. In one of these opinions it is said:

"The people of this State by the Constitutional amendment, heretofore quoted, have seen fit to confer upon municipal corporations the right to enact their own charters, the only limitation upon that right being that such charters shall not conflict with the Constitution or the criminal laws of this State. We take it, therefore, that within the limits of the municipality, and for those purposes which are purely municipal, the City of Portland may include in its charter by amendment any provision or right that the Legislature might have granted before the Constitution was so amended. This being so, there is fair ground for the contention that the city may, by amendment to its charter, obtain the right to locate a public bridge over the Willamette River at any point where such river is exclusively within the municipal boundaries, which is the case here."

In the other opinion it is said:

"Section 118½ (passed pursuant to a Constitutional amendment) delegates to cities all the sovereignty of the State within their municipal boundaries, so far as that sovereignty relates to matters of purely municipal concern. Such grants of sovereignty, however, may be recalled by the power conferring them. (**Straw v. Harris**, 54 Ogn. 424), and this power of recall serves to prevent the abuse of the privileges delegated."

But is constructing a bridge over a navigable river a matter of "purely municipal concern?" Is it not a concern of the whole of Oregon and all of its people?

Section 118½, referred to in the latter opinion, is an initiative amendment of its charter adopted by the voters of the City of Portland June 7, 1909, authorizing the construction of what is known as the "Broadway Street Bridge." It authorized the issue of $2,000,000.00 in bonds for the construction of the bridge over the Willamette River and empowered the City of Portland to appropriate and condemn all property, including franchises, which the "Executive Board, or its successors, may require to carry into effect this Section" (118½).

In each of these opinions it is said that Section 76 of the Charter of Portland, passed by the Legislature in 1903, gave the power to the City of Portland to construct bridges over the Willamette River.

Section 76 of the Portland charter provides that:

"The Council of the City of Portland shall, at all times, under the limitations herein set out have power to provide * * * * * for the acquisition, ownership, construction and maintenance of * * * * * bridges and ferries and such other public utilities as the Council may designate; provided, however, save as otherwise prescribed in this charter, no contract or agreement for the purchase, condemnation, ownership, construction or operation by the city, of any public utility shall be entered into by the Council without first submitting such proposed contract or agreement to the qualified voters of the city, in accordance with the provisions of this article."

While it might otherwise appear that the initiative amendment 118½ of the Portland charter does not refer to Section 76 of that charter, but is a distinct addition to the charter and the right to build this bridge is wholly under said Section 118½, and was not exercised under said Section 76 or under any other amendment thereof, the decision of the Supreme Court apparently determines the matter, although prior to this decision there was some question as to whether the city had more than a bare recognition of a right to construct bridges, for there is no grant under the charter of the City of Portland or by an act of the Legislature, prior to the passage of the amendment of the Portland charter, complained of in the Kiernan case, which authorized in express terms the

construction of such a bridge across the Willamette River, it being a navigable river, or for creating a bonded or other indebtedness for the construction of such a bridge.

The grant of a right without power to exercise it cannot be enforced. *(W. U. T. Co. v. Penn. R. R. Co.,* 195 U. S. 540, 574.*)*

Limitations of a City's Indebtedness

There is one important matter which has not yet come before the Oregon Supreme Court for decision. At the time of the adoption of the Oregon Constitution the necessity had become very apparent of limiting the amount of indebtedness that a city or town should contract. The Constitution or laws of many States places a limit on the indebtedness of a municipality, in some instances by limiting it to a percentage of the value of assessed property.

Section 5 of Article XI of the Constitution of Oregon is as follows:

"Acts of Legislative Assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."

Probably, when provision is made under the amendments of 1906, allowing cities and towns to be incorporated, which are not now in existence, this clause will not apply to them, for the reason that they are not incorporated by an act of the Legislature.

But the question arises in cities and towns which were incorporated by special charters by the Legislature, and were in existence at the time of the adoption of the initiative amendments of 1906, whether this Section 5 of Article XI is repealed by implication by the amendment of Section 2 of Article XI of the Constitution. It would seem, as a matter of law, that said Section 5 of Article XI is a limitation upon the power of a city to contract indebtedness where such a provision was in its charter at the time of the adoption of the initiative amendments of 1906, and that the people of such a city or town could not repeal this by initiative. The legal voters of the City of Portland appear to have acted on the assumption that

this Section 5 of Article XI was repealed by the amendments of 1906, or that by amendment of its charter by the people of Portland, this limitation would be amended or repealed.

It is but additional evidence showing the imprudence of initiative measures when such a question is left in doubt.

The Effect of the Kiernan Case

If these two opinions in the Kiernan case are those of the whole Supreme Court of Oregon then it may be said that, under the amendments of 1906, a city may, by initiative amendment of its charter, give itself the right to exercise, within its corporate limits, the power of Eminent Domain, and to construct bridges and other obstructions in a navigable river wholly within the State without authority from the Legislature or from the people of the rest of the State who may be affected thereby, and without the sanction of Congress.

The main points decided in the Kiernan case are, that the power to construct bridges was given by the Legislature by Section 76 of Portland's charter, and that "there is fair ground for the contention that the city may, by amendment of its charter, obtain the right to erect a public bridge over the Willamette River at any point where such river is exclusively within the municipal boundaries," and that the "City of Portland may include in its charter, by amendment, any provision or right that the Legislature might have granted before the Constitution was so amended," and that the construction of a bridge over the Willamette River is "purely municipal," and further, that a taxpayer cannot raise the question as to whether such a bridge is against the acts of Congress relating to navigable streams.

What will the Supreme Court of the United States say as to the right of the City of Portland to build such a bridge, considering the Act of Congress of September 19, 1890?

If Portland should cause a bridge to be erected at each street, or most of the streets, abutting on the Willamette River it would practically confiscate all deep water front on the Willamette River as far south as the rapids at the mouth of the Clackamas River, and be of great detriment to the people of the Willamette Valley outside of Portland and prejudicial

to the rights of the cities of Oswego, Oregon City, Salem, Albany, Corvallis and Eugene.

But what will the Portland people say if a city or town between Portland and the mouth of the Willamette River should erect enough bridges practically to interfere with, or prevent ships coming to Portland? It might be desired, by owners of properties along Columbia slough, to have this done and make all shipping use that slough, when it is deepened by dredging, to the exclusion of the harbor at Portland.

In one of the opinions in the Kiernan case, referring to the right of a city to erect bridges over a navigable river, it is said:

"Such grants of sovereignty, however, may be recalled by the power conferring them (**Straw v. Harris,** 54 Ogn. 424), and this power of recall serves to prevent the abuse of the privileges delegated."

But could such a recall prevent the abuse after the bridges were erected? Such a law could not be a special one. It would have to be a general one, as was decided in *Straw v. Harris.* It is possible, at least, that a city, under the Constitution of the United States, could have a perpetual injunction from the United States Courts against the State's officers, preventing them from removing or interfering with such bridges after they were constructed. The same doctrine would apply if the recall of the power to build bridges was done under amendment of the Oregon Constitution by the people. In such a case the only remedy appears to be that Congress could pass a law providing for the removal of all bridges in the Willamette River. That Congress has such power was held in *Willamette Iron Bridge Co. v. Hatch,* 125 U. S. 1, and in subsequent cases.

Granting Franchises under Amendment of a City's Charter

The Supreme Court has not passed on the question as to whether a city can, by amendment of its charter, give itself the right to grant franchises not authorized under its charter as granted by the Legislature. It would seem that this power or right followed, as a necessary sequence, from the two opinions in the Kiernan case, and thus a city can be authorized by its voters to grant franchises with the same powers as the Legislature might have given before these amendments to

the Constitution, which includes perpetual and exclusive franchises. (*Parkhurst v. Capital City Ry. Co.*, 23 Ogn. 471.)

Such franchises when granted by a city and accepted by the grantee could not be revoked by the Legislature or by the people. They would be protected by Section 10 of Article I, and Section 1 of the Fourteenth Amendment of the Constitution of the United States, although the power of cities to grant future franchises of that kind could be revoked.

This but illustrates again the danger of amending the Oregon Constitution as was done by the amendments of 1906, and the troubles which arise from amending the Constitution by initiative proceedings, and having no regard for precedents or established law, either common or statutory.

Exercise of Powers of Eminent Domain

The exercise of the sovereign powers of Eminent Domain by a municipality, granted by its own initiative amendment of its charter, has not yet been passed upon by the Oregon Supreme Court, although there are *obiter dicta* in several cases, including *McMinnville v. Howenstine, supra,* and *Kiernan v. The City of Portland, supra,* on the subject.

In one of the opinions in the McMinnville case there is *dictum,* at least, to the effect that a city can amend its charter so as to give itself the right to appropriate property situated as well without as within its limits. And in one of the opinions in the Kiernan case there is *dictum,* at least, to the effect that a city can amend its charter so as to give itself the right to appropriate property within its limits.

As there appears to be no limit to this right, until the Legislature passes a general law on the subject, as decided in *Straw v. Harris,* or the Constitution is amended, it would seem that the City of Salem might, by amendment of its charter, condemn or appropriate any of the State's buildings and grounds within its limits, as now or hereafter constructed, including the State Capitol. Of course the Legislature, by a general law, might recover any of these buildings or grounds by condemnatory proceedings. As to whether the people of

Salem could repeal the law of the Legislature, as indicated in *Straw v. Harris,* has not yet been decided.

If a municipality can give itself the right to condemn property outside its limits we may well consider what would be the effect if one municipality tried to appropriate the property of another, for, while it is the law that, without previous authority so to do, one corporation, public or private, cannot appropriate property already devoted to another public use, a municipality might give itself this power, under these initiative amendments of 1906.

What is a Charter?

Section 2 of Article XI, as amended, of the Oregon Constitution provides that the legal voters may "enact and amend their charter."

What is a charter? In Oregon, prior to these amendments, there were as many charters as there were cities and towns, and no two charters alike. Some of them gave the right to exercise, in a limited way, the power of Eminent Domain, and to grant franchises, some did not. In the use in statutes, wills, conveyances, etc., of technical words they are supposed to be used according to their legal meaning.

At the time these initiative amendments of 1906 were adopted, some of the legal definitions of a municipal charter were as follows:

"An Act of Parliament, of Congress or of a State Legislature, creating a corporation, is called the charter of the corporation."

Abbott's Law Dictionary.

"A municipal charter can emanate only from sovereign power, which alone can delegate faculties and functions of government. In England it may be granted by the King or by Parliament; in the United States it is solely an act of sovereign legislative power."

28 Cyclopedia of Law and Procedure, 120.

In *Cooley on Constitutional Limitations,* page *191, it is said:

"The people of the municipalities, however, do not define for themselves their own rights, privileges, and powers. * * * The municipalities must look to the State for such charters of government

as the Legislature shall see fit to provide; and they cannot prescribe for themselves the details, though they have a right to expect that those charters will be granted with a recognition of the general principles with which we are familiar. The charter, or the general law under which they exercise their powers, is their Constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State Legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant."

And in *Cooley on Constitutional Limitations,* at pages *194, *195, it is said:

"The powers of these corporations (municipal corporations) are either express or implied. The former are those which the legislative act under which they exist confers in express terms; the latter are such as are necessary in order to carry into effect those expressly granted, and which must, therefore, be presumed to have been within the intention of the legislative grant. Certain powers are also incidental to corporations, and will be possessed unless expressly or by implication prohibited. Of these an English writer has said: 'A municipal corporation has at common law few powers beyond those of electing, governing, and removing its members, and regulating its franchises and property. The power of its governing officers can only extend to the administration of the by-laws and other ordinances by which the body is regulated.' But without being expressly empowered so to do, they may sue and be sued; may have a common seal; may purchase and hold lands and other property for corporate purposes, and convey the same; may make by-laws whenever necessary to accomplish the design of the incorporation, and enforce the same by penalties; and may enter into contracts to effectuate the corporate purposes. Except as to these incidental powers, and which need not be, though they usually are, mentioned in the charter, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised.

"And the general disposition of the Courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private incorporations. The reasonable presumption that the State has granted in clear and unmistakable terms all it has designed to grant at all."

In proposing and adopting the amendments of 1906, the voters of the State seem to have assumed that to specify that the legal voters of a city or town could enact or amend their

charter was sufficient. This was merely the grant of a power by name, without providing of what such power consists, for there is no definition, in Section 2 of Article XI, as amended, of what a charter is.

In *1 Abbott on Municipal Corporations,* page 40, it is said:

"The power to alter, amend, or repeal the charter of a public corporation must necessarily exist without limitation in the sovereign, otherwise there would be 'numerous petty governments existing within the State, forming a part of it, but independent of the contral of the sovereign power.'"

But in Oregon, by the amendments of 1906, is this sovereign power lodged in the legal voters of the respective municipalities? By the amendment of Section 2 of Article XI of its Constitution, it took from the Legislature the right to "enact, amend, or repeal any charter or act of incorporation for any municipality, city or town," and gave the right to enact or amend their charter to their legal voters, "subject only to the Constitution and criminal laws of the State of Oregon?" In the opinion in *Straw v. Harris* it is said of said amendment and of said Section 1a of Article IV:

"The language used in these amendments considered would appear to give to incorporated cities the exclusive control and management of their own affairs, even to the extent, if desired, of legislating within their borders, without limit, to the exclusion of the State."

It can hardly be doubted that this is exactly what the proposers of these amendments, and, presumably, what the majority of the voters in 1906 intended in adopting these amendments. And this was done apparently without a knowledge of the primary principles of constitutional law or of the law relating to municipalities.

In order to arrive at this conclusion, however, the Supreme Court must have overlooked its decision in the case of *Hood River Lumbering Company v. Wasco County,* 35 Oregon, 498. This was a case where the constitutionality of a statute was involved, which did not provide for notice to the non-consenting owner of proceedings for appropriation of his property and gave him no opportunity to be heard as a matter of right. The Court held the law unconstitutional on this ground. On page 508 Mr. Justice Bean said:

"A notice not provided for by law is, in truth, no notice at all, and it is the province of the Legislature, and not of the Courts, to enact

laws which shall prescribe the notice that brings parties into Court. If no notice is provided by law, no effective notice can be given, since a notice not authorized can have no legal force, and, without a notice authorized by some valid statute, there can be no due process of law. **The Courts have no right to supply the omission by interpolating provisions, for it is their duty to give effect to the statutes as they are written, and they cannot amend imperfect enactments."**

As a matter of strict constitutional law, under the amendments of 1906, can any Oregon municipality give to itself the right to exercise any sovereign powers not granted to it by its charter from the Legislature? Must not the right to exercise these sovereign powers be granted by amendment of the Constitution made by the legal voters of the whole State of Oregon, not only to municipal corporations in existence when these amendments were adopted, but to those created thereafter? And thus prevent the abuse of the exercise of these powers by municipalities, to the prejudice of the rights of the rest of the people of the State.

And thus it must have come that the Oregon Supreme Court found itself in a position where it must either hold said initiative amendments of 1906, relating to municipalities, void for uncertainty or relating only to its business affairs, or otherwise, in order to make them workable and not "in violation of our fundamental law," and to amend them by judicial decisions, or, in the language of the Court, to "read into them" appropriate words and phrases and limitations. And so we have the decision in *Straw v. Harris.* But that case does not settle all the questions that must arise under these initiative amendments, which themselves "are in violation of our fundamental law."

I have treated of some, only, of the questions involved in these initiative amendments to the Oregon Constitution relating to the amendments of charters of municipal corporations. I have the highest respect for the Oregon Supreme Court and for the learned lawyers who are its Justices. They have had legal problems that are not easy to solve in the cases involving these amendments of the Oregon Constitution which they have had to decide. Whatever may be their views, or those of the Oregon Bar Association, as to the advisability of adopting these amendments, they are parts of the Oregon Constitution and must be respected accordingly.

I have endeavored, in this address, to show the danger and impracticability of the people making radical changes in a State Constitution without considering, and in contravention of the history, the principles, and the fundamental law of a republican form of government and in opposition to the traditions and to the genius of our institutions.

Appendix A

Section 1 of Article IV, as amended, of Oregon Constitution is as follows:

"§ 1. The legislative authority of the State shall be vested in a Legislative Assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislative Assembly, and also reserve power at their own option to approve or reject at the polls any act of the Legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the Legislative Assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

Note 1. The above section is an amendment to the original Constitution, and was adopted by the Twentieth Legislative Assembly; adopted by the Twenty-first Legislative Assembly; adopted by the people, by a vote of 62,024 for, to 5,668 against it, June 2, 1902. Total vote of the State June 2, 1902, 92,990.

Note 2. Section 1 as originally adopted was as follows:

"The legislative authority of the State shall be vested in the Legislative Assembly, which shall consist of a Senate and House of Representatives. The style of every bill shall be: 'Be it enacted by the Legislative Assembly of the State of Oregon,' and no law shall be enacted except by bill."

Appendix B

Section 1a of Article IV of Oregon Constitution is as follows:

"§ 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the Legislative Assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their muncipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative, in any city or town."

Note.—The above section was proposed by initiative petition filed in the office of the Secretary of State February 3, 1906, and adopted by vote of the people, 47,678 for, and 16,735 against, June 4, 1906. Total vote of the State June 4, 1906, 99,445.

Appendix C

Section 2 of Article XI, as amended, of Oregon Constitution is as follows:

"§ 2. Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The

Legislative Assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

Note 1. The above section was proposed by initiative petition filed in the office of the Secretary of State February 3, 1906, and adopted by vote of the people, 52,567 for, and 19,852 against, June 4, 1906. Total vote of the State June 4, 1906, 99,445.

Note 2. Section 2 of the original Constitution read as follows:

"Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights."

Appendix D

As another instance of the working of the initiative under the amendments of the Oregon Constitution, attention is called to the amendment of Article VII of the Oregon Constitution, adoped at the election held November 8, 1910.

The amendment provides, in effect, that the judicial power of the State shall be vested in one Supreme Court and in such other Courts as may, from time to time, be created by law. It further provides that the judges shall be elected by the legal voters for a term of six years; that the Courts shall remain as at present constituted until otherwise provided by law; and that in all civil cases, three-fourths of the jury may render a verdict.

The main objectionable features of this amendment are in its Section 3, which is as follows:

"Section 3. In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of this State, unless the Court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the Court to the jury, and any other matter material to the decision of the appeal. If the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the

Court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the Court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court. Provided, that nothing in this section shall be construed to authorize the Supreme Court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower Court."

It will be seen that there is apparently a conflict between the provisions of the first sentence of Section 3, relating to the effect of a verdict by a jury in an action at law, and the power and duty of the Supreme Court on an appeal when there is attached to the bill of exceptions by either appellant or respondent, "the whole testimony, the instructions of the Court to the jury, and any other matter material to the decision of the appeal."

Under the familiar rule of construction that where, in a statute, there are apparently conflicting provisions, they must be reconciled if it is possible to do so, Section 3 should be construed to mean that the verdict of a jury cannot be re-examined by any Court inferior to the Supreme Court, and only by the latter when the whole record is before it. Thus, a Circuit Court cannot grant a new trial if there be a verdict of a jury, with a scintilla of evidence to support it, even when such a verdict is excessive or outrageous or given under prejudice or passion; probably, not on account of newly discovered evidence. Once a verdict, always a verdict, until it reaches the Supreme Court. The sufficiency of the verdict will apply to appeals to the Circuit Court where there is a jury trial in the County Court or in a Court of a Justice of the Peace. It would seem that practically there can be no appeal to the Circuit Court, when there has been a jury trial in an inferior Court. The testimony is not transmitted in such appeals to the Circuit Court. But the provisions of the first sentence as to the conclusions of a verdict by a jury do not apply to a criminal case, for the last sentence of Section 3 is:

"Provided, that nothing in this section shall be construed to authorize the Supreme Court to find the defendant in a criminal case

guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower Court."

The appeal provided for in Section 3 applies to both civil and criminal cases. The words are: "Upon appeal of *any case* to the Supreme Court" the provisions apply. And what are the provisions upon an appeal? Either the appellant or the respondent may (and certainly the appellant always will) "have attached to the bill of exceptions the whole testimony, the instructions of the Court to the jury, and any other matter material to the decision of the appeal." Does this include the verdict? It is immaterial. The verdict of the jury, in the Court below, is not necessarily even a guide to the Supreme Court. It must be guided by "the whole testimony, the instructions of the Court to the jury," and also "any other matter" that either the appellant or respondent may deem "material to the decision of the appeal." It may enter a judgment "after a consideration of all the matters *thus submitted*." If the Supreme Court decides for the respondent, it may do so, "notwithstanding any error committed during the trial" by the Court below or by the jury. It must consider whether the judgment "was such as should have been rendered in the Court below," after a review of the whole testimony, and also after considering "other matters" in the record. There may be similar action by the Supreme Court, in favor of the appellant, if "it shall be of the opinion that it can determine what judgment should have been entered in the Court below." What, then, is the value of the verdict? By this method of appeal is not trial by jury practically abolished in Oregon? And yet trial by jury has been in existence in English-speaking countries from the time of the Anglo-Saxon rule in England until the present day!

No provision is made in this amendment for sending the case back to the lower Court for re-trial. Its apparent object is to authorize the Supreme Court to make a final determination in every law case appealed, and also in criminal cases, and to direct what judgment shall be entered in the Court below. But how can the Supreme Court make such a determination when the Court below has excluded testimony which should have been admitted? Or made other rulings materially prejudicial to the rights of one of the litigants? To appeal a civil

action to the Supreme Court, merely on errors of the lower Court, will amount to nothing if there has been a verdict of a jury, for "no fact tried by a jury shall be otherwise re-examined in any Court of this State," excepting only when a case is appealed to the Supreme Court, and the whole testimony, etc., is attached to the bill of exceptions. Any matter which can now be shown after the trial, as, for instance, improper conduct by the jury, or that prejudice or passion influenced its verdict, and not appearing by the record of the trial, it would seem, cannot be considered by the lower Court or by the Supreme Court. Certainly if the Supreme Court did take cognizance of such new matters, it could not well determine what the judgment should be. But this amendment gives the Supreme Court the power to dispense a kind of crude, Oriental justice, which may cover deficiencies in this amendment.

While Section 3 gives the right by law to change the powers conferred by it on the Supreme Court in regard to determining what judgments shall be entered in civil and criminal cases, there is no right, by any law, to change the first sentence of Section 3. A change in the latter can be made by Constitutional amendment only. If the power is taken from the Supreme Court to set aside a verdict and to render a judgment, then a verdict once given cannot be re-examined by any Court; however unjust or unfair, it must stand. For centuries the jury has been a check on the tyranny and corruption of judges, while, at the same time, upright judges have corrected the verdicts of ignorant, prejudiced, and venal juries. To do away with this balance of power is to set aside the best safeguards for justice which the wit of man, guided by the experience of centuries, has been able to devise.

Judgements of the Supreme Court in Criminal Cases

At first sight, the first sentence of this Section 3 would make it appear that this Section 3 applied to civil cases only. But that is not the fact. The rest of the section applies to criminal cases also. The punctuation is bad. The word "provided," which is preceded by a period, should be preceded by a colon. What follows after the word "provided" is a part of the sentence. There is no limitation on the "appeal of *any*

case to the Supreme Court," but the limitation is "Provided, that nothing in this section shall be construed to authorize the Supreme Court to find the defendant in a criminal case *guilty of an offense for which a greater penalty is provided* than that of which the accused was convicted in the lower Court."

Mark the words, the offense "of which the accused was convicted in the lower Court," not the offense nor crime for which he was indicted nor for which he was tried! If the accused, in a lower Court, is convicted of a crime for which he was not indicted nor tried, of course an appeal will lie. But the Supreme Court may find him guilty of an offense, without indictment, the only limitation being that the Supreme Court cannot "find the defendant * * * guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower Court." This is made plainer, and is accentuated, by the following provision of Section 5 of said amendment, viz: "No person shall be charged *in any Circuit Court* with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this State, except upon indictment found by a grand jury." By a necessary implication, this provision does not apply to the Supreme Court, which on appeal may find the accused guilty of another crime or offense, but not one "for which a greater penalty is provided than that of which the accused was convicted in the lower Court." The accused may be indicted in a Circuit Court for murder, and convicted of rape or arson by the Supreme Court; indicted for burglary, and convicted on appeal of mayhem; indicted for forgery, and found guilty of obtaining money on false pretenses! And may thus be convicted of a crime for which he was not given a right to make a defense. If Circuit Courts are abolished by law, can persons be tried for criminal offenses without indictments? Indictments are only necessary in Circuit Courts.

Certainly the proposers of this amendment knew little of, or cared nothing for the history of the English people. They ignored the examples of history. Of how, for centuries, the English people struggled against oppression and tyranny, and for the right of a fair and legal trial by a trial jury in civil and criminal cases, and in all felonies upon an indictment found by a grand jury; of how they were triumphant in

the so-called revolution of 1688; of the establishment of the Bill of Rights, which, in its essential features, is a part of the original Constitution of the State of Oregon; of the causes which led to the American Revolution; of the Revolution itself; of the Declaration of Independence. They ignored the debates in the Convention when the Constitution of the United States was formed; the fifth and sixth amendments to the Constitution of the United States; what was published in *The Federalist*; personal liberty as opposed to tyranny; and human rights as against the tyranny of Courts. Take this amendment, with its contradictory provisions, and determine, if you can, what was in the minds of its framers, and what was their intent.

The people and the legal voters of Oregon are certainly of as high average intelligence as those of any other State in the Union. Its earliest pioneers were people of high courage and intelligence, who first saved Oregon and then made it. Oregon has ever since attracted conservative people. It has been no place for the adventurer or the idler. Up to 1900, its growth was not fast. Its population, as shown by the census of that year, was 413,536. Its population, as shown by the census of 1910, is 672,765, an increase of 226,261 in ten years. But only a part of Oregon's voters have taken the initiative amendments seriously. Very few of them have read the proposed amendments, fewer still have taken the trouble to give any serious thought as to what most of the initiative amendments meant. Many do not vote on initiative measures, hoping that what is right or proper will prevail. Many who voted for this amendment of Article VII of the Constitution were misled by the first clause of its ballot title. Its ballot title was as follows:

"For amendment to the Constitution of the State of Oregon, providing for verdict by three-fourths of jury in civil cases; authorizing grand juries to be summoned separate from the trial jury, permitting change of judicial system by statute, prohibiting re-trial where any evidence to support verdict; providing for affirmance of judgment on appeal notwithstanding error committed in lower Court, directing Supreme Court to enter such judgment as should have been entered in lower Court; fixing terms of Supreme Court; providing judges of all Courts be elected for six years, and increasing jurisdiction of Supreme Court."

This careless, not to say dilettant, way of voters considering or not considering serious amendments of the Constitution

by the initiative is one of the strongest reasons against its use. If the voters will not seriously, carefully, intelligently and conscientiously act, then it must continue to be a failure and, at the same time, a menace to the stability of government as it has heretofore prevailed in the United States.

Consider the vote by which this amendment was adopted! Initiative amendments do not require a majority of all the voters, merely a majority of the votes cast for or against the amendment. The total number of votes cast for Governor, which was less than the number of registered voters, at the election November 8, 1910, when this amendment was adopted, was 117,690. The vote in favor of the adoption of this amendment was 44,545, and against its adoption 39,307. The affirmative votes were 14,301 less than a majority, a proportion of votes cast for the amendment as compared with the total votes for Governor of less than thirty-eight per cent. There were 33,738 voters for Governor who did not vote on the amendment at all. The total number of voters who voted against this amendment, and those who did not vote on it, is 73,045, as against 44,545 who voted for it. And thus a Constitution is amended in Oregon and the vital principles of American institutions and the precedents of law, and the safeguards of liberty and of a republican form of government, may be set aside.

It may be that my conclusions as to the effect of this amendment are wrong, but I believe I am right. In any event, a radical change has been made in Oregon's fundamental law. It is true, the Oregon Supreme Court may, by its decisions, amend this initiative amendment of Article VII, and say that its effect must be as the Supreme Court decides. It was held in *Straw v. Harris,* 54 Ogn. 424 (103 Pacific Reporter, 777), that "the language used in the amendment considered would appear to give" certain powers, and that "whatever may be the literal import of the amendment, it cannot be held that the Oregon Constitution can be so amended." But this is a limitation on the power of the voters of Oregon to amend the Constitution, and is a limitation that is not now in the Constitution itself. What then of this sacred right of the initiative? And what of the doctrine, by which it is upheld—that the people are never wrong? And thus

thirty-eight per cent of them are right in amending the Constitution for the other sixty-two per cent. Let the minority rule!

As there are no limitations on the powers of the voters to amend the Oregon Constitution, it would not be impossible to have an amendment providing for referendum votes on decisions of the Supreme Court. A petition with nine thousand signatures would require such an amendment to be submitted to a vote at the next election.

I have written to show in how crude, unsatisfactory, and ignorant a manner radical changes may be made by initiative amendments to a carefully considered and established Constitution, such as Oregon has had for more than fifty years. It is to be hoped that the time is not far distant when the legal voters of Oregon will invoke the initiative to abolish it.